OCTOBER TERM, 1973

No. 73-972

JAMES CARFORA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of nine counts of mail fraud, in violation of 18 U.S.C. 1341. On March 6, 1972, he was sentenced to two years' probation and a $2,500 fine. As a special condition of probation, petitioner was ordered to make full restitution to the three airlines victimized by his mail fraud no later than April 1, 1972.

On August 16, 1972, a second probation revocation petition was filed with the district court[1] charging that

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[1]An earlier revocation petition had been filed on June 20, 1972, charging that petitioner had failed to make restitution as ordered. After a hearing, the district court entered an order finding no violation and imposing a special condition to provide for specifically scheduled restitution payments.

petitioner had violated his probation in three respects: (1) his restitution check for $390 to Eastern Airlines was returned marked "account closed;" (2) the partial restitution payment of $364.65, scheduled to be paid to Trans World Airlines in July 1972, was never made; and (3) he failed to report to the probation officer on August 15, 1972, as directed.

A hearing to determine the validity of these charges was commenced before the district court on September 26, 1972; at the court's direction, this hearing was continued on five separate occasions to allow for the production of additional evidence.[2]

At the initial hearing on September 26, 1972, petitioner admitted, through his attorney, that the charges alleged in the August 16, 1972, probation revocation petition were substantially correct. At subsequent hearings, testimony was presented which demonstrated that petitioner had stated, in a deposition in a pending civil suit, that he possessed a diamond ring valued at $7,000. In addition, petitioner had loaned an individual $300 in November 1972, and on January 30, 1973, possessed various valuable assets, including jewelry and coins.

Petitioner, testifying in his own behalf, offered a series of explanations for his admitted failure to comply with the trial court's schedule of restitution payments and for his other apparent probation violations (Tr. 3—9/26/73).

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[2]The subsequent probation revocation hearings were held on October 25 and November 29, 1972, and January 15, January 24 and January 30, 1973.

These explanations included his alleged poor physical condition, his having been "robbed" and his financial difficulties (Tr. 9/16/—9/26/73).[3] On May 4, 1973, the district court revoked petitioner's probation (Pet. App. 11a-15a) and sentenced him to a term of imprisonment for two years, four months to be served in prison and the remainder suspended; additionally, petitioner was placed on probation for two years to commence upon expiration of his confinement. The court of appeals, one judge dissenting, affirmed (Pet. App. A).

1. Petitioner avers that the district court erred in revoking his probation in that it failed to make findings of fact as to the basis of its ruling and ordered revocation despite "overwhelming evidence" that petitioner lacked the funds to make restitution (Pet. 10-11). The majority below, however, put these claims to rest when it found (Pet. App. 4a):

> The record as a whole clearly establishes that Judge Gurfein intended to, and did, revoke [petitioner's] probation on the grounds that he did not fail to make the payments to the airlines because of penury and that he did have the means to pay.

This conclusion is supported by the testimony at the various hearings and a careful reading of the district court's order revoking probation. For example, on November 29, 1972, the district court stated that the purpose of the hearing was to allow the presentation of evidence by the government to refute petitioner's claim of impecun-

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[3]Petitioner offered varying descriptions and dates of an alleged robbery of his business premises in an effort to explain the loss of certain assets. He advised on of his creditors that he had been robbed on April 5, 1972. He testified on June 26, 1972, that the robbery had taken place on Arpil 13, 1972. However, on January 30, 1973, he testified that he had not in fact been robbed, but had been subject to a lawful attachment of assets by one of his judgement creditors.

iousness (Tr. 3—11/29/73). The prosecutor stated that the government would prove petitioner deliberately failed to make restitution and that he did have funds available. In addition, on January 15, 1973, the prosecution stated that it would prove instances of fraud committed by petitioner after his sentencing as evidence that he was deliberately attempting to mislead the court (Tr. 1—1/15/73).

During the course of these hearings, petitioner made no effort to challenge the initial charges set forth in the revocation petition or rebut the evidence contradicting his defense of insufficient financial resources. Rather he relied on a series of explanations, the validity of which had been seriously questioned. After detailing petitioner's business dealings and practices, the district judge concluded that petitioner had not been truthful in claiming an inability to make restitution, finding that his "practices, as disclosed, do not show a probationer worthy of trust" (Pet. App. 15a). We submit that, as the violations were conceded, it was unnecessary for the district court to make specific findings on any issue other than whether the violations were willful. Moreover, the district court holding that petitioner did not commit the infractions charged in the third specification in the revocation petition refutes any suggestion that it did not find the other two specifications proved.

2. Petitioner further claims that the district court revoked his probation because of his fraudulent business practices, a violation not encompassed in the written revocation petition.[4] As already discussed, this claim is not well taken.

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[4]Judge Feinberg in dissent was of the view that the district court's opinion did not make clear the basis of the revocation order and believed the cause should be remanded for specific findings in that regard (Pet. 4a-10a).

But even assuming *arguendo* that the district court did base petitioner's revocation on a violation not specifically charged in the written petition, we submit that in the circumstances of this case, no deprivation of due process resulted thereby. Petitioner does not claim that the findings made by the district court regarding his business practices were erroneous. Moreover, it is clear that petitioner's conduct in this regard was in violation of the district court's probation order,[5] and thus could properly be relied on by Judge Gurfein as a ground to revoke probation. See *United States* v. *Wilson*, 469 F. 2d 368, 370 (C. A. 2).

Gagnon v. *Scarpelli*, 411 U.S. 778, and *Morrissey* v. *Brewer*, 408 U.S. 471, should not be so rigidly construed as to require an automatic finding of a denial of due process whenever there is the least deviation from the requirements there set forth. At the core of those decisions was this Court's statement in *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 484:

> What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior.

That directive was scrupulously adhered to in the instant case. Petitioner was accorded an extensive revocation hearing and was assisted by counsel. Although his fraudulent business practices were not included among the specifications in the written petition to revoke probation, he was afforded oral notice thereof. The facts surround-

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[5]The probation order provided in relevant part that petitioner "refrain from violation of any law (federal, state, and local)" and "live a clean honest and temperate life."

ing these practices were fully developed at the hearings, at which petitioner and counsel were present and able to confront witnesses and controvert the evidence. Moreover, petitioner was on notice as early as October 25, 1972, that Judge Gurfein proposed to consider his business activities while on probation (Tr. 2—10/26/72).

The purpose of requiring written notice of the charges and a hearing at which the probationer may call and confront witnesses is to provide "substantial protection against ill-considered revocation." *Gagnon* v. *Scarpelli, supra,* 411 U.S. at 786. There was no "ill-considered revocation" here. Indeed petitioner does not contend that the matter of his fraudulent business practices was raised without warning or that he was not given a full opportunity to refute the evidence against him. Rather, he claims that lack of written notice constitutes a *per se* violation of due process. Such a reading of *Gagnon* and *Morrissey* in the present context exalts form over substance and in no way advances the fundamental principles announced by those decisions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

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